No. 18677

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT I. SAMSING,

Appellant,

vs.

S & P COMPANY, *et al.*,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Appellant's "Statement of the Case" is substantially correct as far as it goes, but in appellees' view it is not quite complete. Appellees therefore submit the following.

Supplementary Statement of the Case.

Appellant's complaint herein set forth purported wage claims arising under three successive collective bargaining agreements covering the years 1958-1960, 1960-1962, and 1962-1964. Copies of the 1960-1962 and 1962-1964 agreements are attached to the complaint, marked Exhibits A and B respectively and by reference incorporated therein. No copy of the 1958-1960 agreement was attached, but it was alleged that that agreement "is similar to the 1960-1962, and the 1962-1964 agreements," copies of which were attached.

Each of the labor agreements pleaded prescribed a comprehensive scheme for the submission, negotiation,

and arbitration of "any dispute or grievance arising at or involving an establishment subject to this Agreement:" Complaint, Exhibit A, Sec. 29, pp. 66-71, and Exhibit B, Sec. 29, pp. 61-65.

With respect to compliance with the contract grievance procedure the complaint alleged only "That plaintiff has exhausted all of the administrative remedies provided for in said labor agreement or he has attempted so to comply."

At the argument on appellees' motion to dismiss, appellees' counsel pointed out that the contracts pleaded provided a grievance procedure and that appellant's allegation respecting compliance with it was "a pure conclusion on the part of the pleader." [Rep. Tr. pp. 4-5, 11, 13-14.][1]

After referring to the "many, many attempts of union men to bypass the administrative setup" the District Court stated that "Where it appears or even if there is doubt they have exhausted the remedy I feel it is the duty of the Court to hold the integrity of the contract". [Rep. Tr. p. 12.]

Although thus put on notice by remarks of both the Court and counsel that the matter of compliance with the grievance procedure was questioned, particularly in reference to the sufficiency of appellant's pleading in that respect, appellant's counsel nevertheless evinced

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[1]Appellees' counsel also stated as matter of fact that there had been no compliance with the grievance procedure [Rep. Tr. p. 12]. While this was outside the record and the District Court did not rely on it [Rep. Tr. p. 14] it showed that appellees' contention was a serious one and not a mere quibble concerning pleading, and it should have indicated to appellant's counsel the advisability of pleading facts if he had any; moreover, appellant's counsel did not challenge the statement.

the intention to stand on his pleading as written. [Rep. Tr. p. 13.] He did not indicate that there were any facts upon which to base an amendment so as to lay at rest the serious question which had been raised. Nor did he announce any intention of amending or ask leave to amend, either before or after the Court indicated that the motion to dismiss would be granted.

At the conclusion of the hearing on the motion to dismiss February 25, 1963, the Court announced that the motion to dismiss would be granted on the ground that it appeared on the face of the complaint that appellant had failed to exhaust his contract administrative remedies. [Rep. Tr. p. 14.] Judgment of dismissal was not entered until March 7, 1963. [R. p. 20.] Appellant made no motion to set aside the judgment; instead, he filed the present appeal. In his brief on appeal (p. 9) appellant for the first time mentioned the possibility of amending his complaint; he asserted that "the Court below should have allowed the plaintiff to amend, even though *no such request was made by plaintiff.*" (Emphasis supplied.)

Summary of Argument.

I.

Where it is made to appear that a labor contract sued on provides a grievance procedure applicable to the claim involved, a Federal district court does not have jurisdiction to entertain the claim unless and until the contract remedy has been exhausted. Where the complaint discloses the existence of such a remedy, it is incumbent on the plaintiff to show that he has complied with it, and a mere conclusionary allegation is insufficient. The motion to dismiss was properly granted and judgment of dismissal thereon was correct.

II.

It is not true that the District Court dismissed the action on its own motion; appellees moved for dismissal (although initially for different reasons) and at the argument pointed out the deficiency in the complaint. In any event, the District Court was authorized to dismiss the action for want of jurisdiction, either at the suggestion of a party or on its own motion.

III.

Appellant did not amend his complaint, although he could have done so as of right at any time until the judgment of dismissal was entered. And after the judgment was entered he did not move, as he could have done, to set it aside so that he could then ask leave to amend. Instead, he chose to stand on his pleading as written and appeal from the judgment. The District Court was not obliged to invite or suggest an amendment. Appellant is mistaken in his assertion, made for the first time on appeal, that the District Court should have granted him leave to amend despite his failure to request the same.

ARGUMENT.

I.

The Action Was Properly Dismissed for Want of a Sufficient Showing That Appellant Had Exhausted His Remedy Provided by the Contracts Which He Pleaded and Sued On.

This action was purportedly brought under Section 301 of the Labor-Management Relations Act, 1947 (29 U. S. C. A., Sec. 185 (a).) Without regard to that law it has been uniformly held that the Federal courts will not entertain a claim under a labor contract which provides an applicable grievance procedure unless and until the contract remedy is exhausted—at least in States (like California) where the local law so provides: *Transcontinental & Western Airlines v. Koppal,* 345 U. S. 653; *Barker v. Southern Pacific Co.* (C. A. 9), 214 F. 2d 918; *Jacobson v. Luckenbach S.S. Co.* (D. C., Ore.), 201 F. Supp. 883, 889. Such is the law in California: *Cone v. Union Oil Co.,* 129 Cal. App. 2d 558, 564, 277 P. 2d 464, 468.

Actions under Section 301, Labor-Management Relations Act, 1947, are governed by Federal law, which may embrace State law where consistent: *Textile Workers Union v. Lincoln Mills,* 353 U. S. 448, 456-457; *Local 174 v. Lucas Flour Co.,* 369 U. S. 95, 103.

Federal law and policy favor the arbitration of grievances. For example, in *Drake Bakeries, Inc. v. Local 50,* 370 U. S. 254, 263, it is said:

> In passing §301, Congress was interested in the enforcement of collective bargaining contracts since it would "promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace" (S. Rep. No. 105,

> 80th Cong., 1st Sess. 17). It was particularly interested in placing "sanctions behind agreements to arbitrate grievance disputes" (*Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456.) The preferred method for settling disputes was declared by Congress to be "final adjustment by a method agreed upon by the parties" (§203(d) of the Act, 29 U. S. C. §173(d)). "That policy can be effectuated only if the means chosen by the parties for settling their damages under the collective bargaining agreement is given full play." (*United Steelworkers v. American Mfg. Co.,* 363 U. S. 564, 566.)

In line with that national policy, it has been held that the exhaustion of labor contract remedies is a jurisdictional prerequisite to suit. Thus, in *Evans v. Hudson Coal Co.* (C. A. 3), 165 F. 2d 970, 972-973, it was held that a motion for stay pending arbitration was properly made under Rule 12(b)(1), Federal Rules of Civil Procedure, which permits the defense of want of subject-matter jurisdiction to be made by motion, and the court said that pending arbitration the district court was "deprived of jurisdiction of the subject matter."

In *Arnold v. L. & N. R.R.* (D. C., Tenn.), 180 F. Supp. 429, it was said that ". . . the Court is . . . without jurisdiction because the parties have not exhausted the administrative remedies provided for in the Memorandum of Agreement"

Accord: United Mine Workers v. Roncco (D. C. Wyo.), 204 F. Supp. 1, 4.

Until recently it was held that §301, Labor-Management Relations Act, 1947, did not authorize actions

brought to assert employees' individual rights under labor contracts: *Assn. of Westinghouse etc. Employees v. Westinghouse Electric Co.,* 348 U. S. 437. On this point, the Supreme Court reversed itself at the last term: *Smith v. Evening News Assn.,* 371 U. S. 195, holding that employees may sue under §301 to assert at least certain kinds of contract claims. But the Supreme Court was careful to point out (in footnote 1) that in that case "There was no grievance arbitration procedure in this contract which *had to be exhausted before recourse could be had to the courts.*" (Emphasis supplied.) Thus, the jurisdiction of the Federal courts to entertain individual employee claims under §301 is limited by the requirement of exhaustion of grievance arbitration procedures—a requirement previously recognized as being a limitation on §301 jurisdiction.

Appellant's complaint disclosed the existence of a comprehensive contract grievance arbitration procedure. In order to invoke the jurisdiction of the Federal courts he was therefore required to show that he had exhausted that procedure. What he did was merely to allege "That plaintiff has exhausted all of the administrative remedies provided for in said labor agreement or he has attempted so to comply." This was a mere conclusion, wholly uninformative as to what he claimed to have done to comply or attempt to comply.

Appellees' motion to dismiss admitted only well-pleaded allegations of the complaint, not legal conclusions (2 Moore's Federal Practice, 2d ed., §1208; *Newport News Shipbuilding etc. Co. v. Schauffler,* 303 U. S. 54, 57) or inferences or conclusions of fact not supported by allegations of specific facts upon which the inferences or conclusions rest (*Homan Mfg. Co. v.*

Russo (C. A. 7), 233 F. 2d 547, 550; *Weeks v. Denver Tramway Corp.* (C. A. 10), 108 F. 2d 509, 510.)

> "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . ."

Rule 8(a) Federal Rules of Civil Procedure.

Federal pleading under Rule 8(a) is supposed to be simple, as indeed it usually is. But it is a mistaken "view that the rule does not require the averment of any information as to what has actually happened . . . Rule 8(a) envisages the statement of circumstances, occurrences, and events in support of the claim presented . . ." (October 1955 Report of the Advisory Committee on Civil Rules, Note to Rule 8(a)(1), quoted at page 655, Moore's Federal Practice, Civil Rules and Official Forms as amended 1963, with Comments.)

Where, as here, the jurisdiction of the District Court depended on appellant's exhaustion of his contract remedy, it was incumbent on appellant to allege facts to show that the court had jurisdiction. But appellant did not do so, although the deficiency in his complaint was repeatedly called to his attention. The District Court was right in stating that "even if there is doubt they have exhausted the remedy I feel it is the duty of the Court to hold the integrity of the contract". [Rep. Tr. p. 12.] In these circumstances the motion to dismiss was properly granted and judgment of dismissal was correct.

II.

The Court Did Not Dismiss the Action on Its Own Motion, Although It Could Properly Have Done So.

Appellant asserts that the District Court erred in raising on its own initiative the point of failure of exhaustion of the contract grievance arbitration procedure.

As mentioned above, appellees' counsel first pointed out that appellant's allegation with respect to exhaustion of the contract remedy was a pure conclusion. [Rep. Tr. p. 5.] The District Court did not act on its own initiative. But it would have been perfectly proper for it to have done so.

As stated above, exhaustion of the contract grievance arbitration procedure was a jurisdictional prerequisite. The District Court properly concluded that appellant's pleading was not sufficient to invoke the Court's jurisdiction. Rule 12(h), Federal Rules of Civil Procedure, provides: ". . . whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Thus, the court had not only the right but the duty to dismiss for want of jurisdiction. In *Tipton v. Bearl Sprott Co.* (C. A. 9), 175 F. 2d 432, 436-437, this Court said:

> ". . . the third amended complaint failed to state a claim of which the District Court had jurisdiction. It should have dismissed on that ground. That the District Court's jurisdiction was not challenged is immaterial."

III.

Appellant Did Not Choose to Amend; the District Court Did Not Deny Him Leave to Do so; and It Did Not Err in Failing to Invite Him to Do So.

Appellant admits that he did not ask leave to amend his complaint, yet he complains that "The Court below should have allowed the plaintiff to amend." (Brief for Appellant, p. 9.) Since appellant did not ask leave to amend, there was no denial of such leave. We do not understand appellant's contention in this respect, unless he means to claim that the District Court should have invited or suggested an amendment. If so, the following language from *Keene Lumber Co. v. Leventhal* (C. A. 1), 165 F. 2d 815, 823, is particularly applicable:

> Rule 15(a) permits a party to amend his pleadings "once as a matter of course at any time before a responsive pleading is served." We take it that a motion to dismiss is not a "responsive pleading" within the rule . . .; and that, therefore plaintiff might have amended its complaint as a matter of right at any time before the District Court entered its judgment dismissing the complaint. There was ample opportunity to do so, for several weeks elapsed between the filing of the motions to dismiss and the judgment of dismissal. It does not appear that the plaintiff at any time indicated to the District Judge a desire or intention to amend. After the judgment of dismissal had been entered, it was too late for the plaintiff to amend as a matter of right, but application might have been made to the District Court for discretionary re-

> lief from the judgment under Rule 60(b), asking that the judgment be set aside, in order to permit the filing of an amended complaint which, by mistake or excusable neglect, the plaintiff had previously failed to do . . . The record does not indicate that any such motion was presented to the District Judge. Under the circumstances we do not think that the Judge had a duty to take the initiative of suggesting or inviting an amendment.

By appealing rather than amending before judgment or thereafter asking to have the judgment set aside and to be granted leave to amend, appellant chose to stand on his original complaint, which is insufficient. His suggestion for amendment, heard for the first time on appeal, is untimely.

Conclusion.

It is submitted that appellant's complaint did not sufficiently allege exhaustion of his contract grievance arbitration procedure so as to invoke the jurisdiction of the District Court, that the motion to dismiss was properly granted, that the District Court did not err in giving judgment of dismissal, and that the judgment should be affirmed.

Respectfully submitted,

MURRAY M. CHOTINER,
Attorney for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MURRAY M. CHOTINER,
Attorney for Appellees.

APPENDIX.

Statutes and Rules.

§301, Labor-Management Relations Act, 1947 (29 U.S.C. §185(a))

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Rule 8(a), Federal Rules of Civil Procedure

A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .

Rule 12, Federal Rules of Civil Procedure

. . . (b) . . . the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . (6) failure to state a claim upon which relief can be granted . . .

. . . (h) . . . (2) . . . whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action . . .

Rule 15(a), Federal Rules of Civil Procedure

(a) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . .